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71-1479

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

SYLVESTER MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Sylvester Moore, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on April 12, 1972.

A.

The Opinion Below

On April 12, 1972, the petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C.

Questions Presented

1. Whether a Court of Appeals in affirming a conviction is justified in relying upon testimony that petitioner allegedly frequently purchased large quantities of heroin and cocaine, which would necessarily involve at least incidental possession, when the Trial Court ruled as a matter of law that there was no proof that the petitioner was ever in possession of either heroin or cocaine.

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2. Whether an affirmance by a Court of Appeals where a seeming misstatement of fact appears in the decision below on a material part of the argument advanced below should be reviewed.

3. Whether the sentencing provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 should be applied retroactively.

D.

Statutes Involved

Title 21, United States Code, Sections 173, 174
Title 21, United States Code, Sections 841 (1) (A)*
Title 28, United States Code, Section 1254 (1)

E.

Statement of the Case

The petitioner, Sylvester Moore, was tried along with ten others for a violation of Sections 173, 174 of Title 21, United States Code, a conspiracy. After a trial before a jury the petitioner was convicted of the single count of the indictment.

The petitioner was sentenced to a fine of $10,000 and to ten years of imprisonment. The prosecution below related to the dealings of four Government witnesses who admitted to deep involvement in narcotics transactions with two principal figures, Antonio Flores and Jesus Torrado.

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There was extensive testimony about the efforts of Flores and Torrado to obtain and then sell the narcotics.

Sylvester Moore was charged below with being part of the conspiracy to distribute heroin and cocaine.

Reasons for Granting the Writ

1. The decision below raises a significant question concerning the breadth and weight to be given to a finding of law by the Trial Court based upon facts it has heard during the course of a trial.

During the course of its charge the Trial Court found as a matter of law and so charged the jury that there was no proof that the petitioner was in possession of either heroin or cocaine. The Trial Court made this finding in the part of its charge that dealt with the statutory presumption of 21 United States Code 173, 174.

The Trial Court did not merely find as a matter of law that there was no direct evidence of possession but also found as a matter of law that there was no circumstantial evidence of possession since it charged the jury in an unqualified manner that there was no evidence upon which the jury might draw the statutory inference as it related to petitioner.

The Trial Court stated in its charge:

> I charge you that there is no evidence in the case upon which you may draw the statutory inference as it relates to the defendant Sylvester Moore. I find that as a matter of law there is no proof that the defendant Sylvester Moore was in possession of either cocaine or heroin.

However in its opinion affirming the conviction the Court of Appeals, while discussing petitioner's argument that there was no independent non-hearsay evidence that the petitioner had knowledge of the illegal importation of narcotics by the conspirators, appeared to rely heavily upon circumstantial evidence of purchases of heroin and cocaine which necessarily involve at least incidental possession of the two narcotics, and if the testimony of the Government witnesses is to be believed, involves direct unqualified possession of heroin and cocaine.

The Court of Appeals, in its opinion, the full text of which appears in Appendix A, stated as its basis for rejecting petitioner's argument that proof of his knowledge of illegal importation of the narcotics was insufficient, that:

> The circumstantial evidence consisted of, *inter alia*: testimony that Moore visited the Georgia Girl bar frequently, that he frequently purchased large quantities of heroin and cocaine from Flores and Torrado, and that he put up $12,000 to purchase some three kilos of cocaine from Fernando Acosta in Miami. From his daily association with the leaders of the conspiracy and his continuous large scale transactions with them, we think the jury was entitled to find Moore intimately involved with the conspiracy and fully knowledgeable that the narcotics were illegally imported. *United States* v. *Ah Kee Eng*, 241 F.2d 157 (2d Cir. 1957), is distinguishable. There but a single transaction was involved; here the transactions were sizable and continuing.*

* It is noted parenthetically that while it is not made clear in the opinion of the Court of Appeals, the alleged putting up of $12,000 by the petitioner to purchase three kilos of cocaine was a transaction which was uncompleted and unsuccessful and the money was returned to New York.

It can be seen that the Court of Appeals mentions three times within that paragraph, the only paragraph in the opinion dealing with this argument by the petitioner, that petitioner in effect or of necessity possessed heroin or cocaine in that he "frequently purchased large quantities of heroin and cocaine from Flores and Torrado," and "his continuous large-scale transactions with them," and "the transactions were sizable and continuing."

It is submitted that it is questionable whether the Court of Appeals would have rendered the same decision had the finding of law by the Trial Court been given full weight as the plain meaning of its words seem to demand.

It is submitted that this Petition raises an issue of significance with respect to the administration of federal criminal justice. The Trial Court clearly acted properly in weighing the evidence and making the finding of law. It is submitted that a Trial Judge should not be restricted in making such findings of law where appropriate, and where such findings would help simplify and clarify the issues before the jury. This is especially so in a multi-defendant case such as this, which involved more than 4000 pages of testimony.

Moreover once such a finding is made as a matter of law, it is submitted that the appeals court reviewing just the typed record should not in any way dilute the finding by the Trial Judge who is closer to the evidence. Rather, it is submitted, any finding of law by the Trial Judge who heard the evidence should be given full weight according to the plain meaning of the finding.

Here the Trial Judge plainly stated that he found as a matter of law that the petitioner was not in possession of either heroin or cocaine and yet the Court of Appeals apparently relied heavily upon at least incidental possession as a basis for its affirmance. It is respectfully submitted that the issue of what weight should properly be given a finding of law by the Trial Court has significance in the administration of federal criminal law.

2. The decision below misstated the facts in a material respect in its conclusion regarding petitioner's argument that there was no proof, based on independent non-hearsay evidence, that petitioner had knowledge of the illegal importation of narcotics by the conspirators.

Due to a failure of proof of direct knowledge and conceding the inapplicability of the statutory provision, the Government had to rely on circumstantial proof to show that petitioner had knowledge of illegal importation of narcotics by the conspirators.

The Court below found such circumstantial proof. Its entire discussion of this argument was quoted in the first reason advanced for granting the Writ. As stated in that first reason, the decision below apparently rests heavily upon its thrice stated conclusion that the petitioner frequently purchased large quantities of heroin and cocaine.

This was not so in the evidence.

Regarding this petitioner, the only time a quantity of narcotics was mentioned was when one prosecution witness stated that the petitioner put up money to purchase three

kilos of cocaine.* It was brought out by this same witness that this alleged deal fell through and the money was returned to New York.

Although there was testimony that the petitioner purchased heroin and cocaine (which evidence, it is submitted, should be disregarded for the reasons stated in the first reason advanced for granting the Writ), there was never any indication of what quantity was involved. Therefore it is submitted that it is a material misstatement of the facts to state or assume as in the decision below that the petitioner "frequently purchased large quantities of heroin and cocaine", or that he had "continuous large-scale transactions" with the leaders of the conspiracy or that his "transactions were sizable and continuing", and that this misstatement is fundamental to the determination of the issue of whether the petitioner had knowledge of the illegal importation of the narcotics.

The balance of the proof against the petitioner could not sustain the Government's burden on this issue. The proof of mere association with members of the conspiracy does not by itself implicate the petitioner. *United States* v. *Stromberg*, 286 F. 2d 356 (2 Cir. 1959). The offer to provide money for the purchase of just cocaine does not raise an inference of knowledge of illegal importation. *Turner* v. *United States*, 396 U.S. 398 (1970).

While petitioner recognizes that factual errors are not a compelling reason for the granting of this petition, it is submitted that this Writ should be granted because of the

* The other prosecution witness to this event stated that another alleged conspirator put up the money, not the petitioner.

injustice that results from the heavy reliance upon these unfounded conclusions in the decision below.

3. The decision below raises a conflict between two Circuits on the issue of the retroactivity of the sentencing provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

There is a conflict in rulings between the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit on this issue; see *United States* v. *Fiotto*, — F. 2d —— (2 Cir. 1972), cert. granted, —— U.S. —— (1972); *United States* v. *Stephens*, 449 F.2d 103 (9 Cir. 1971).

Since there may be other narcotics violators similarly situated and to resolve the conflict, it is submitted that this Writ should be granted.

The petitioner was arrested when 21 U[redacted]States Code 174 was in effect. That statute carried a [redacted]atory minimum five year sentence and a maximum sentence of twenty years. The petitioner was sentenced under that statute. By the time of sentence the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 et seq. had taken effect. The new statute carries a maximum of fifteen years and has no mandatory minimum.

The petitioner raised this issue for the first time upon appeal. Between the time the petitioner submitted this point in his brief and the time of oral argument, the Second Circuit Court of Appeals decided *U.S.* v. *Fiotto*, supra, which was on the exact point and adverse to the petitioner.

Stephens, supra, involved the same contentions raised here by the petitioner and the Ninth Circuit resolved the issue favorably to the petitioner's contentions.

In *U.S.* v. *Stephens,* supra, the very issue before the Court here was considered and resolved favorably to the petitioner's contentions that were made in this very case. In *Stephens* the accused was convicted of trafficking in marijuana in violation of 26 U.S.C.A. 176a. That statute and 26 U.S.C.A. 7237 (d) at the time of the commission of the offense called for a mandatory minimum jail term of five years upon conviction. At the time of sentencing the newly enacted Drug Control Act was in effect. The sentencing Court sentenced the accused to a five year jail term, the mandatory minimum under the repealed statutes but suspended the sentencing and placed the accused on five years probation. The probation was based on the newly enacted Drug Control Act.

The Government brought a Mandamus proceeding against the Judge to vacate the sentence imposed, and to compel the Judge to impose the mandatory minimum under the repealed statute. The Government's application was denied. It was held that the non-abatement requirement of the newly enacted narcotics statute was satisfied because the prosecution of the offender was fully effected. *Korematsu* v. *United States,* 319 U.S. 432 (1943). However, the sentencing was distinct from the prosecution. The survival provisions provided for in 1 U.S.C.A. 109 were not germane because the mandatory minimum required by the former narcotics statute, section 7237(d) of Title 26 U.S.C. was not encompassed by section 109.

In *People* v. *Oliver,* 1 N.Y. 2d 152 (1956), Court of Appeals of the State of New York, a fourteen year old offender killed his brother. He was charged under the then existing State statute which provided that a person between the age of 7 and 16 years could be prosecuted for murder as it was a crime punishable with death. After indictment, the accused was committed to a State mental institution because he was found incapable of defending the action. When he was 23 year old he was adjudged sufficiently recovered to stand trial. However, at the time of trial the statute underlying the crime was amended and existed in its amended state. That statute as amended provided that only a youth 15 years old could be held responsible for crimes punishable by death or life imprisonment. The accused was convicted under the pre-existing statute. The Court of Appeals of the State of New York, being the Court of Last Resort, held that the judgment of conviction had to be reversed and dismissed the indictment. That court held that the defendant should have received the benefit of the amended statute even though the crime was committed prior to the amendment. It appears that one of the grounds that was the basis for that decision was the judicial policy that is partial to the retroactivity of procedural statutes.

It was stated in *People* v. *Oliver,* supra, at page 160, that:

> A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment

can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.

The Petitioner was sentenced to ten years of imprisonment and a $10,000 fine. It is argued that he is entitled to re-sentence under the new law on the reasoning that the sentencing judge, in imposing a harsher sentence on petitioner than on several other defendants convicted at the same trial with the petitioner (other defendants received sentences of five and seven years), may have been seeking to differentiate the petitioner on the sentence and since there was a mandatory minimum of five years which he had to impose in the case of those seen as lesser defendants, he therefore felt compelled by this reasoning to impose a more severe sentence of ten years on the petitioner; whereas had the sentencing judge had the flexibility of the new law at the time of sentence to impose a sentence of less than five years on lesser defendants, then he might by this same logic, have imposed less than ten years on the petitioner.

Conclusion

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT J. KREIGER

GARY R. SUNDEN

Counsel for Petitioner

Dated: New York, New York

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 500-502; 504; 517-521—September Term, 1971

(Argued February 23, 1972 Decided April 12, 1972)

Docket Nos. 71-1934-40; 71-2210-11

UNITED STATES OF AMERICA,

Appellee,

v.

WARNELL VEGA, a/k/a Skippy; PEDRO CAREW, a/k/a Pedro Carus; LEROY ALLEN, BOBBY WYLER, a/k/a Robert Wyler; NELSON RIVERA, ORLANDO GURIDI, LOUIS GURIDI, DALILAH R. REYES, SYLVESTER MOORE, and JOHN TIRADO, a/k/a Johnny Dynamite,

Appellants.

Before:

LUMBARD, MANSFIELD, MULLIGAN,

Circuit Judges.

Appeal from judgments of conviction for violation of 21 U.S.C. §174, after a trial before Chief Judge Mishler and a jury in the Eastern District of New York.

Affirmed.

DESMOND J. O'SULLIVAN, Special Assistant United States Attorney (Robert A. Morse, United States

Attorney for the Eastern District of New York, and David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

GARY R. SUNDEN, New York, N.Y., *attorney for Appellants Warnell Vega, Leroy Allen, Pedro Carew, Bobby Wyler and Sylvester Moore.*

JERALD ROSENTHAL, New York, N.Y., *attorney for Appellants Orlando Guridi, Louis Guridi and John Tirado.*

IVAN S. FISHER, New York, N.Y., on the brief, *for Appellants Nelson Rivera and Dalilah R. Reyes.*

LUMBARD, *Circuit Judge:*

The ten appellants in this case seek reversal of their convictions, following trial before a jury and Chief Judge Mishler in the Eastern District of New York, for conspiring to import narcotics into the United States and to buy, sell, conceal and facilitate the transportation, concealment, and sale of narcotics known to them to have been illegally imported, all in violation of 21 U.S.C. §174. We find no error and affirm.

The facts, developed in some 4,000 pages of trial transcript may be briefly summarized for the purpose of considering the appellants' claims of error. Oscar Estrada was a principal government witness. In or about January 1968 appellant Pedro Carew introduced him to Toni Flores and Jesus Torrado, owners of the Georgia Girl bar in Manhattan. Shortly thereafter Estrada began working at the bar and in their narcotics business. Appellants Sylvester Moore, Leroy Allen, and Warnell Vega were introduced by Flores and Torrado to Estrada with the instructions to "take care" of Moore and the confidence that Allen and

Vega were customers of the narcotics business. Moore and Allen visited the bar almost daily, and Vega telephoned frequently about narcotics. Moore also maintained a car rental agency in Harlem, and Flores occupied an office therein out of which he sold cocaine and heroin when the bar was "hot."

Estrada's wife, Carmen, worked as a barmaid at the bar during February and March of 1968. She testified that the customers were mostly narcotics rather than liquor customers, that Flores told her to take care of the narcotics customers, and that appellants Moore, Allen, Carew, Vega, and Louis and Orlando Guridi were frequent or daily visitors to the bar. She was also told by Flores that Moore was one of the best customers, and she overheard Flores and Torrado arguing with Moore about the quality of narcotics Moore had received. She saw Moore bring money to Flores and Torrado about six times, and she saw them sniff cocaine after counting the money.

In March 1968 Moore gave Flores and Estrada $12,000 with which to purchase some three kilos of cocaine from Raul Fernandez and Fernando Acosta in Miami, Florida, and $1,000 for expenses in connection with the transaction. In April Torrado and Estrada took two suitcases, brought by Torrado from Miami and containing heroin, cocaine and guns, to Torrado's apartment in New Rochelle, where appellant Carew, Torrado's "chemist," mixed, strained, weighed, and packaged some of the heroin. The following day cocaine and heroin were delivered to appellant Vega, who examined the narcotics and, satisfied as to their quality, made a down payment. Further deliveries were made to Vega on a weekly basis. Later in April Torrado and Estrada delivered cocaine to appellant Allen, to whom Estrada subsequently made five or six more deliveries.

Also in late April Torrado and Estrada delivered both heroin and cocaine to appellants Nelson Rivera and Dalilah Reyes, operators of a dry cleaners in the Bronx. Estrada returned several times thereafter to try to collect the money for the cocaine, which Rivera and Reyes claimed was so inferior that they had had to make refunds to their customers.

In May Estrada delivered or accompanied delivery of narcotics to appellants Carew, Orlando and Louis Guridi, and Vega. Transactions with Vega and the Guridis continued throughout June. Estrada and Torrado also delivered cocaine to appellant Bobby Wyler on at least two occasions in June.

Louis Gomez, another government witness, began working for the conspiracy on June 22. He testified to having been present at narcotics transactions with appellants Allen and John Tirado, to having spoken several times with Vega on the telephone about Vega's need for narcotics for his own customers, and to having collected money from Vega for cocaine. Gomez also visited appellants Rivera and Reyes at the dry cleaners to collect for the previous sale of cocaine, whereupon Rivera and Reyes complained that the last purchase had been no good but agreed to pay installments if Torrado agreed to keep on supplying them. Gomez also estimated that the volume of narcotics sold by the conspiracy resulted in a "take" of between $100,000 and $150,000 per week.

Appellants Vega, Carew, Allen, Wyler, Rivera and Reyes argue that reversal is appropriate because the government alleged a single conspiracy but proved instead several conspiracies of the "hub/spoke" variety. We disagree. "[T]he mere fact that certain members of the con-

spiracy deal recurrently with only one or two others does not exclude a finding that they were bound together in one conspiracy." *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). "An individual associating himself with a 'chain' conspiracy knows that it has a 'scope' and that for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the Government in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level." *Id.* at 827.

Kotteakos v. *United States*, 328 U.S. 750 (1946), the case most frequently cited by appellants in conspiracy cases, is inapposite. That case involved thirty-two defendants and some eight separate conspiracies to defraud the government in relation to FHA loans. The separate conspiracies were connected by one Simon Brown as the "hub"; each particular group had no interest in the success or failure of each other group. In the instant case, however, the volume of transactions involved necessarily put the purchasers on notice that the operation was sufficiently large-scale to include other purchasers as well as importers, wholesalers, and so forth. Those operating at one level (e.g., the retailers) certainly relied on the successful activities of those operating at another level (e.g., the importers). "It is clear that in a narcotic conspiracy case of this nature no one member of the group can by himself insure the success of the venture; he must know that combined efforts are required." *Agueci, supra*, at 827.

In any event, the issue in *Kotteakos*, and the test for reversible error, is not whether more than one conspiracy has been proved, but whether such a variance resulted in substantial prejudice to the appellants. We are directed to no specific prejudice resulting from the single indictment, and find a consolidated trial appropriate. See *id.*

Appellants Orlando Guridi, Louis Guridi and John Tirado argue that because they were minor participants in a large conspiracy they were prejudiced by not having been tried separately. A joint trial is improper, however, only if substantial prejudice results therefrom, and not if there would simply be a better chance of acquittal at a separate trial, an argument which is purely speculative at best. *United States* v. *Borelli*, 435 F.2d 500 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). The evidence adduced at trial against the Guridis was overwhelming. They frequently handled transactions involving thousands of dollars worth of heroin and cocaine. The evidence against Tirado was as compelling.

Orlando Guridi argues that his conviction should be reversed because the district court allowed evidence tending to show that he exercised his right to remain silent during a removal hearing in Florida. The flaw in this contention is that Guridi did not, in fact, remain silent in the Florida hearing but instead, while represented by counsel and in open court, denied that he was the Orlando Guridi sought by the authorities. At trial he denied his Florida testimony. Testimony in rebuttal by a government witness present at the Florida hearing was not prejudicial to a right to remain silent which was never exercised.

Appellant Moore claims that proof of his knowledge of the illegal importation of the narcotics with which he was

dealing was insufficient. The government concedes that there was no direct evidence demonstrating Moore's actual knowledge, and that the statutory inference arising from possession was unavailable, but argues that the circumstantial evidence to this effect was overwhelming. We agree. The circumstantial evidence consisted of, *inter alia*: testimony that Moore visited the Georgia Girl bar frequently, that he frequently purchased large quantities of heroin and cocaine from Flores and Torrado, and that he put up $12,000 to purchase some three kilos of cocaine from Fernando Acosta in Miami. From his daily association with the leaders of the conspiracy and his continuous large-scale transactions with them, we think that the jury was entitled to find Moore intimately involved with the conspiracy and fully knowledgeable that the narcotics were illegally imported. *United States* v. *Ah Kee Eng*, 241 F.2d 157 (2d Cir. 1957), is distinguishable. There but a single transaction was involved; here the transactions were sizable and continuing.

We have considered the other claims of the appellants and find them wholly without merit. Judgments affirmed.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of April one thousand nine hundred and seventy-two.

Present:

Hon. J. EDWARD LUMBARD,
Hon. WALTER R. MANSFIELD,
Hon. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WARNELL VEGA, aka Skippy, PEDRO CAREW, aka Pedro Carus, LEROY ALLEN, BOBBY WYLER, aka Robert Wyler, NELSON RIVERA, ORLANDO GURIDI, LOUIS GURIDI, DALILAH R. REYES, SYLVESTER MOORE and JOHN TIRADO, aka Johnny Dynamite,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

APPENDIX C

Statutes Involved

Title 21, United States Code, Section 173

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any nar-

cotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, §2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, §3, 46 Stat. 586.

Title 21, United States Code, Section 174

§174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 21, United States Code, Section 841(1)(A)

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

Title 28, United States Code, Section 1254(1)

Court of Appeals; Certiorari; Appeal; Certified Questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1479

SYLVESTER MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of New York, petitioner and nine co-defendants were convicted of conspiracy to import narcotics into the United States and to buy, sell, conceal and facilitate the transportation, concealment and sale of narcotics known by them to have been illegally imported, in violation of 21 U.S.C. 174. Petitioner was sentenced to imprisonment for ten years and fined $10,000. The court of appeals affirmed (Pet. App. A).

In January 1968, co-conspirator Estrada, a government witness, was a bartender in a Manhattan bar. At that time defendants Flores and Torrado approached him about working with them in the narcotics business, and he agreed to do so (Tr. 484-486). Shortly thereafter, Flores introduced Estrada to petitioner, telling Estrada to "take care" of him (Tr. 494, 498). Petitioner was a regular visitor to the bar, coming to see Flores or Torrado two or three times a week late in the evening. Petitioner would also telephone Flores or Torrado two or three times a day (Tr. 498-500). Flores opened an office at petitioner's place of business and sold cocaine and heroin there when the bar was "hot" (Tr. 502-505).

Estrada's wife worked at the bar during February and March of 1968. She testified that most of the business there was in narcotics (Tr. 1342-1343). She saw petitioner there four or five times a week and talked with him on the telephone almost daily. Torrado also told her to take good care of petitioner (Tr. 1347-1349). About a half dozen times she saw petitioner bring money in a paper bag to Torrado and Flores. They would count the money at a table in the rear of the bar, after which they would sniff cocaine. Once she heard an argument among them; petitioner was threatening not to pay for his "stuff," because he said it was no good (Tr. 1350-1352).

In March 1968, Estrada went with Torrado to Florida to obtain cocaine and heroin (Tr. 517). They needed more money and Estrada returned to New York, where he met with Flores and another defen-

dant in petitioner's office (Tr. 514-517). Estrada told Flores in the presence of petitioner that they needed $15,000 to buy three kilos of cocaine. Petitioner gave Estrada $13,000 to cover the purchase of the cocaine and their expenses (Tr. 527-531). Later that month Torrado bought one and a half kilos of cocaine in Florida for $10,500 (Tr. 560-565). Another co-conspirator, Gomez, testifying for the government, estimated that the value of the narcotics sold by this group averaged $100,000 to $150,000 weekly (Tr. 2099).

1. Contrary to petitioner's contention (Pet. 4-7), there is no conflict between the trial court's instruction that the evidence failed to show possession of narcotics and the statement of the court of appeals that the evidence showed petitioner's knowledge of illegal importation. The evidence showed that petitioner, who was in almost daily contact with other members of the conspiracy, frequently brought money to them in paper bags, that petitioner and the others discussed narcotics purchases and that on one occasion petitioner put up a large sum of money for a purchase of cocaine in Florida. This amply established his participation in the conspiracy, even though there was no direct evidence of petitioner's actual possession of narcotics at any particular time. As the court of appeals correctly found (Pet. App. A, 7a): "From his daily association with the leaders of the conspiracy and his continuous large-scale transactions with them, we think the jury was entitled to find Moore intimately involved with the conspiracy and

fully knowledgeable that the narcotics were illegally imported." Cf. *Turner* v. *United States*, 396 U.S. 398, 416-417.[1]

2. Petitioner also seeks review on the grounds that he was sentenced under 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 7273(d), repealed prior to his trial, and not under the Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. 801-966. Petitioner's contention (Pet. 9-12), however, is purely speculative and is not supported by the record, for petitioner's sentence of ten years' imprisonment exceeded the mandatory minimum under the old law (five years), and accordingly the mandatory minimum did not affect his sentence. Cf. *United States* v. *Bates*, 429 F. 2d 557, 560 (C.A. 9), certiorari denied *sub nom. Isbell* v. *United States*, 400 U.S. 831, and *Green* v. *United States*, 400 U.S. 916. It is nevertheless our contention that the repealed sentencing provisions remain fully effective as to violations committed prior to repeal, by reason of both the general saving statute, 1 U.S.C. 109, and the special saving clause of the new Act, Section 1103(a), 84 Stat. 1294. See *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied, May 15, 1972, No. 71-1114.

The decision below is not in conflict with *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9). That case involved the question whether 26 U.S.C. (1964

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[1] The claimed inaccuracies (Pet. 7-9) in the summary of the evidence by the court below do not change the crucial fact that petitioner played a significant role in the conspiracy.

ed.) 7237(a), which prohibited probation or suspension of sentence, still applied to offenses committed prior to the new Act's effective date. The Ninth Circuit there concluded that the saving clauses referred to above did not pertain to such post-judgment matters as probation and suspension. The issue sought to be raised in the present case concerns not probation or suspension but, like *Fiotto*, the minimum penalty imposed by the old law. The court in *Stephens* recognized that this question was different from the issue it was required to decide. See 449 F. 2d at 104.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[3] While we did not oppose the petition for a writ of certiorari in *Bradley, et al.* v. *United States*, No. 71-1304, certiorari granted, June 12, 1972, that case raises the different question of eligibility for parole with respect to which there was a conflict between the First Circuit decision in *Bradley* and the implications of the Ninth Circuit decision in *Stephens*.

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